United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Court of Appeals, District of Columbia.

APRIL TERM, 1908.

No. 1890.

CHRISTIANA HYDE, ADMINISTRATRIX, APPELLANT,

vs.

THE SOUTHERN RAILWAY COMPANY, APPELLEE.

BRIEF FOR APPELLEE.

Statement of Case.

The statement of this cause in brief for the appellant, pages 1 and 2, is sufficient for all purposes, and is therefore adopted and no extended statement presented by appellee.

ARGUMENT.

I.

The declaration in this cause, so far as the four counts before this court for consideration are concerned, is based on the act of the Congress of date June 11, 1906, and which is commonly termed the Employers' Liability Act. (See Appendix I.)

This act has been construed by the United States Supreme Court, 207 U. S., 463 to 541, inclusive, and declared unconstitutional, "repugnant to the Constitution and non-enforceable" (207 U. S., at page 504).

We assume that this decision is the law of this case. In the opinion of the Supreme Court, the act as an entirety, without qualification or limitation, is non-enforceable. The contention of appellee is that the act is severable; that part of it is unconstitutional and part constitutional; that the constitutional portion should be enforced and the unconstitutional part rejected.

Putting it in another form, the question is, Can this act be separated by this court into two parts, namely, a part affecting alone the District of Columbia and the Territories, and a part affecting commerce between the States? The Supreme Court of the United States, in its opinion, distinctly declined to so do. It considered this bill as a whole. To assume that the Supreme Court of the United States was not aware of its former opinions, holding that in certain cases an act may be constitutional in part and unconstitutional in part, and the one enforced and the other rejected, would be an assumption that we do not care to father. That this highest court recognized it to be its duty to sustain legislation enacted by a coördinate branch of the Government, when possible so to do, is also apparent when you consider prior decisions of that court and the language of the opinion under consideration.

As well stated by counsel for appellant (Brief, page 5):

> "There is no principle more firmly established or more steadily adhered to than that which precludes the judiciary from denying effect to the legislative will, unless the repugnancy of that will to the Constitution is so plain that the court cannot avoid, by any possible construction, the duty of so declaring."

We consider it proper to enlarge the statement in appellant's brief by quoting the words of Mr. Justice White, who

handed down the opinion of the court in the Employers' Liability Act, as reported in Buttfield *vs.* Stranahan, 192 U. S., 470, at page 492:

> "In examining the statute, in order to determine its constitutionality, we must be guided by the well-settled rule that every intendment is in favor of its validity. It must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears."

In the Sinking Fund Cases, 99 U. S., 700, Mr. Chief Justice Waite, at page 718, says:

> "It is our duty, when required in the regular course of judicial proceedings, to declare an act of Congress void if not within the legislative power of the United States; but this declaration should never be made except in a clear case."

It strengthens the contention of appellee here, to quote the language of these distinguished justices; for, with that guiding principle clearly in mind and thought, the Supreme Court says this act is repugnant to the Constitution. Evidently nothing could be saved and that conclusion reached with the court having fully before it and thoroughly in mind the fact that the act did refer to common carriers engaged in trade and commerce in the District of Columbia as well as to interstate-commerce common carriers.

On pages 500, 501, 207 U. S., the court says:

> "So far as the face of the statute is concerned, the argument is this, that because the statute says carriers engaged in commerce between the States, etc., therefore the act should be interpreted as being exclusively applicable to the interstate-commerce business, and none other, of such carriers, and that the words 'any employé,' as found in the statute, should be held to mean any employé when such employé is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it. But if we could

> bring ourselves to modify the statute by writing in the words suggested, the result would be to restrict the operation of the act as to the District of Columbia and the Territories. We say this because immediately preceding the provision of the act concerning carriers engaged in commerce between the States and Territories is a clause making it applicable to 'every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States.' "

Here, then, is a distinct statement that the court was carrying in its mind the fact that this act covered both common carriers engaged in trade and commerce in the District of Columbia or in any Territory of the United States, as well as common carriers engaged in commerce between the States.

The court then continues:

> "It follows, therefore, that common carriers in such Territories, even although not engaged in interstate commerce, are by the act made liable to 'any' of their employés, as therein defined. The legislative power of Congress over the District of Columbia and the Territories being plenary and not depending upon the interstate-commerce clause, it results that the provision as to the District of Columbia and the Territories, *if standing alone,* could not be questioned. Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested; that is, by causing the act to read 'any employé when engaged in interstate commerce,' we would restrict the act as to the District of Columbia and the Territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy.
>
> "The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute

> so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. Illinois Central Railroad *vs.* McKendree, 203 U. S., 514, and authorities there cited."

II.

We now ask this court to take the excerpt just cited above from the decision of the Supreme Court of the United States, construing this law, and apply it to the argument of counsel for appellant, first, that the act in controversy is a valid exercise by Congress of its constitutional power of exclusive legislation over the District of Columbia and the Territories, and, second, that the act is separable, and that it is a matter of comparative ease to "cut as with a knife the words extending the act to interstate commerce from the other words. When this excision is made, the statute still reads as a consistent and perspicuous whole" (Appellant's Brief, pp. 7, 8).

The Supreme Court says:

> "that the provision as to the District of Columbia and the Territories, if standing alone, could not be questioned,"

and follows that declaration by stamping the whole act as unconstitutional and non-enforceable. The conclusion necessarily is that, as this provision as to the District of Columbia and the Territories does not stand alone, it is questionable and can not be enforced. The court evidently saw in this act of the Congress a purpose to legislate regarding a great and a far-reaching proposition. It was to cover the employés of common carriers engaged in trade and commerce, not alone in the limited area of the District of Columbia and the Territories, but the employés of every common carrier engaged in trade or commerce between all the States and Territories and foreign nations. The scope and reach of the bill as adopted are from shore to shore and Lakes to Gulf, and therefore the Supreme Court naturally says, on page 501—

> "Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated."

This is exactly what counsel for appellant urges in his brief, in section 6, covering pages 6, 7, 8, 9, 10, 11, and 12. He says:

> "Now let us see what is necessary to be done to separate the valid territorial from the invalid interstate provisions of this act,"

and follows this with the first section of the act restated, omitting all portions of same referring to common carriers engaged in commerce between the States and foreign nations. This bill, after being submitted to the pruning knife of counsel, appears as follows:

> "CHAPTER 3073. An act relating to liability of common carriers in the District of Columbia and Territories to their employés.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Con-*

> *gress assembled,* That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States shall be liable to any of its employés, or in the case of his death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employés, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, way, or works."

This is an exceedingly well-drawn bill, but it is a law never considered nor enacted by the Federal Congress, and never approved by the President, and it is the exact bill that the Supreme Court says, if standing alone, could not be questioned, but which the Supreme Court says is unconstitutional because it does not stand alone, and because it cannot be separated from the residue of the act, the unconstitutional portions thereof.

Furthermore, the court says it is not plain that the Congress would have enacted this bill of counsel for appellant, although constitutional and well expressed. It is possible that Congress would not care to place an extraordinary burden upon common carriers engaged in trade or commerce in the District of Columbia or in any Territory of the United States, and exempt from this burden the great interstate common carriers of the nation, also subject to their control. The act does not show on its face an intention to regulate two distinct things, namely, commerce within the District and commerce between the States, but it does show an intention to regulate every common carrier engaged in trade or commerce, whether in the District or whether engaged in such trade or commerce between the States. The regulation is single, the location of its operation twofold, and this is partly the basis of the decision by the court, that you can-

not separate and divide this bill into unconstitutional and constitutional halves.

In further support of this view, we quote from the dissenting opinion of Justice Moody, 207 U. S., p. 509:

> "Nor can the statute be saved by rejecting that part of it which is unconstitutional, because its provisions are single and incapable of separation. The vicious part, if such exist, is so intermingled with that which is good that it cannot be eliminated without destroying the whole structure."

Mr. Justice Holmes, in his dissenting opinion, recognizes that the purpose of the bill was to regulate common carriers when engaged in trade or commerce, and wherever so engaged, and that the bill was not twofold. He says:

> "I must admit that I think there are strong reasons in favor of the interpretation of the statute adopted by a majority of the court. But, as it is possible to read the words in such a way as to save the constitutionality of the act, I think they should be taken in that narrower sense. The phrase 'every common carrier engaged in trade or commerce' may be construed to mean 'while engaged in trade or commerce' without violence to the habits of the English speech, and to govern all that follows. The statute then will regulate all common carriers while so engaged in the District of Columbia or in any Territory, thus covering the whole ground as to them; and it will regulate carriers elsewhere while engaged in commerce between the States, etc., thus limiting its scope where it is necessary to limit it. So construed, I think the act valid in its main features under the Constitution of the United States."
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> 207 U. S., at p. 541.

III.

We believe that the decision under consideration is the whole law of this case; that, in view of its terms and conclusions reached, there is no legitimate and proper basis for the

request made that this court shall declare severable and separable a single act which the Supreme Court of the United States, considering as an entirety, has declared unconstitutional as an entirety. But this opinion is in harmony with prior decisions of the same court.

Illinois Central Railroad *vs.* McKendree, 203 U. S., 514.

The Trade-mark Cases, 100 U. S., 82.

U. S. *vs.* Reese, 92 U. S., 215.

In the case last cited, Mr. Chief Justice Waite, delivering the opinion of the court, said:

> "For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not."

IV.

In support of the position that the constitutional part of an act will be enforced and the unconstitutional part rejected, we find cited on page 4 of appellant's brief the case of the District of Columbia *vs.* Green, 29 Appeals D. C., 296. We submit that this case cannot be used as authority for the proposition stated. There, under an act of Congress approved March 1, 1899, an information had been filed in the name of the District of Columbia, charging Green with an offense fully described and set out *in section 1* of said act. The entire act was attacked as being unconstitutional because of certain provisions contained *in section 2.*

This court, speaking through Mr. Justice Shepard, said, at page 299:

> "The offense charged in the information is that defined in the first section of the act above recited. This section makes no exception in favor of any

> person and no discrimination whatever between persons or property similarly situated. * * * The attack upon the validity of the act is founded on the provisions of section 2 which, it is contended, makes an unconstitutional discrimination between resident and non-resident owners. * * * We think it a sufficient answer to the contention to say that the provisions of section 2 are not involved in the present case. * * * Without expressing any opinion as regards the validity of section 2, we may concede for the purposes of this case that it violates the principle of equality, but it does not follow that the entire act is for that reason to be declared void. *The two sections are distinctly separable from and entirely independent of each other. The first may, therefore, stand and be enforced without regard to the validity of the second.*"

In the case at bar counsel for appellant is not asking that one section shall be upheld and another section declared unconstitutional, but is insisting that a single section, covering every common carrier engaged in trade or commerce in the District of Columbia and between the several States and the States and foreign nations, shall be declared in part constitutional and in part unconstitutional.

V.

The Congress, after the opinion of the Supreme Court holding unconstitutional the Employers' Liability Act had been handed down, began almost immediately the consideration of a bill covering virtually the same ground, but in conformity with the views expressed by the court. This bill was approved April 22, 1908, and a consideration of it shows how the Congress grouped in one clause all common carriers engaged in commerce between the States, and then in a distinct and separate clause, common carriers by railroad in the Territories, the District of Columbia, and the Panama Canal Zone. Therefore, under that law, one section could

possibly be held unconstitutional and the other preserved in its entirety, for there is no such interdependence and interlacing and connection between the two as renders the two sections one distinct, authoritative legislative enactment.

Further, we suggest, in consideration of this new statute, while in the last clause of same there is a provision that it shall not affect the prosecution of any pending proceeding or right of action under the original act, that provision was in all probability inserted because under rule 30 of the United States Supreme Court a petition for rehearing can be presented at the term at which the judgment is entered. This term has not yet closed, and therefore such a petition for rehearing could be filed. The opinion of the court was only by a majority of one, and therefore there might be a seeming possibility of a rehearing being granted and an opinion sustaining the law handed down. In this state of the case it was perfectly proper to place this clause in the act.

VI.

Should this court hold the Employers' Liability Act to be enforceable and valid so far as the District of Columbia is concerned, the further question to be considered is whether the right of recovery in this case should be limited to $10,000, as provided by the District Code, section 1301, or whether there should be no limitation as to the amount of recovery. The act says that—

> "Every common carrier engaged in trade or commerce in the District of Columbia or in any Territory of the United States * * * shall be liable * * * for all damages which may result from the negligence of any of its officers, agents or employés, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, ways or works."

We insist that the Employers' Liability Act, if held constitutional so far as same affects this District, does not repeal the provisions of section 1301 of the Code of laws in force in the District of Columbia, under which the amount recoverable in this case is limited to the sum of $10,000. Congress in legislating directly and specifically for the District of Columbia, and not legislating generally for the benefit of all employés of common carriers engaged in trade and commerce in the United States, has provided that where death results from negligence, recovery cannot exceed the sum of $10,000. The bill under consideration does not directly or indirectly repeal this provision of the District Code. The repeal of a statute by implication is never favored. This is a familiar rule of law and well stated in the case of Frost *vs.* Wenie, 157 U. S., at page 58:

> "It is well settled that repeals by implication are not to be favored, and where two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, the duty of the court, no purpose to repeal being clearly expressed or indicated, is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject and therefore to displace the prior statute."

The employers' Liability Act, if held constitutional, would graft upon the existing Code provisions certain new conditions:

1st. The common carrier engaged in trade or commerce in this District would be liable, although the injury or death occurred through the negligence of a fellow-servant, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, &c.

2d. It would change existing law with regard to contributory negligence of the employé injured, and as to the defense that could be interposed by the carrier where there was a contract of employment, insurance, relief, benefit, or indemnity. These additional legislative provisions could all be applied by the courts and the limitation of $10,000 retained.

These Code provisions are a special statute, limited in force and area to this District, and cannot be repealed merely by implication. It is clearly the duty of the court to preserve any portion of the original statute not directly or necessarily repealed.

Am. & Eng. Encyc. of Law, Vol. 26, pp. 726, 727, 739, 740, 741.

Mayor of Cumberland *vs.* Magruder, 34 Md., 381.

Conclusion.

We close with the closing words of Mr. Justice White in the opinion of the court construing this Employers' Liability Act:

> "Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution, and non-enforceable; and the judgments below are, therefore, affirmed."
>
> 207 U. S., at page 504.

We respectfully ask that the judgment below in the case at bar be affirmed.

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APPENDIX I.

An Act relating to liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employees.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another, or between any Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

SEC. 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

SEC. 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided, however,* That upon

the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

SEC. 4. That no action shall be maintained under this act, unless commenced within one year from the time the cause of action accrued.

SEC. 5. That nothing in this act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the safety-appliance act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three.

Approved, June 11, 1906.

[31081]